

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

No. 14-20587

Plaintiff,

vs.

District Judge Sean F. Cox
Magistrate Judge R. Steven Whalen

MARQUAN FRANKLIN,

Defendant.

/

ORDER

On December 8, 2015, Defendant Marquan Leroy Franklin filed a Motion to Vacate, Set Aside, or Correct Sentence [Doc. #25], under 28 U.S.C. § 2255, claiming that his trial counsel was constitutionally ineffective. Before the Court is the government's Motion for Court Order to Waive the Attorney-Client Privilege [Doc. #36]. The motion is GRANTED IN PART AND DENIED IN PART.

A criminal defendant who raises an issue of ineffective assistance of counsel impliedly waives the attorney-client privilege. *See In re Lott*, 424 F.3d 446, 452-53 (6th Cir. 2005). However, the waiver is ““limited to the extent necessary to litigate a petitioner’s ineffective assistance of counsel claims,”” and “litigants cannot hide behind the privilege if they are relying upon privileged communications to make their case.” *Id.* at 453-54, quoting *Mason v. Mitchell*, 293 F.Supp.2d 819, 823-24 (N.D. Ohio 2003). The Court “must impose a waiver no broader than needed to ensure the fairness of the

proceedings before it.” *In re Lott* at 453.

The government asks to interview Defendant’s trial counsel *ex parte* on her “communications with Franklin regarding the merits of his appeal and whether Franklin expressly asked [counsel] to file a notice of appeal on his behalf.” That request is DENIED.

However, the Court will schedule an evidentiary hearing on Defendant’s § 2255 motion, and at that hearing, the government’s motion for an order to waive the privilege is GRANTED to the extent necessary to litigate the Defendant’s claim of ineffective assistance of counsel, as described in his motion, his affidavit, and his testimony at the hearing.

IT IS SO ORDERED.

s/R. Steven Whalen
R. STEVEN WHALEN
UNITED STATES MAGISTRATE JUDGE

Dated: September 6, 2016

CERTIFICATE OF SERVICE

I hereby certify on September 6, 2016 that I electronically filed the foregoing paper with the Clerk of the Court sending notification of such filing to all counsel registered electronically. I hereby certify that a copy of this paper was mailed to the following non-registered ECF participants September 6, 2016.

s/Carolyn M. Ciesla
Case Manager for the
Honorable R. Steven Whalen